Supreme Court of the United States

OCTOBER TERM, 1946.

No. 562.

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

VS.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

THE OPINIONS BELOW.

The opinion in the District Court (R. 144-157) is not as yet officially reported. The opinion of the Tenth Circuit Court of Appeals (R. 167-177) is reported at 156 F. 2d 513.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 18, 1946 (R. 177). A petition for rehearing was denied August 26, 1946 (R. 188). The petition for certiorari was filed October 2, 1946, and the order allowing certiorari granted November 12, 1946 (R. 189). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347(a).

STATUTE INVOLVED.

The case involves the construction of Sections 3(d), 3(e), 3(g) and 7(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*).

QUESTIONS PRESENTED.

1. Whether it is the purpose of the Fair Labor Standards Act (a) to create a liability for the payment of wages to persons as to whom no wage liability would otherwise exist or (b) to measure the extent of an existing wage liability which has been created by agreement, express or implied?

2. Does the phrase "suffer or permit to work" as used in the Act bring within its scope persons with whom there is no contractual obligation to pay wages either express or implied?

3. Do the purposes of the Act bring employees of an independent contractor into an employer-employee relationship with a plant operator because the contract requires the work to be performed in the plant, in intimate association with the plant operator's employees, and as a

contribution to the common object of production, there being no intent to evade the Act?

STATEMENT.

This is a suit praying for an injunction against petitioners for claimed violations of the Fair Labor Standards Act. The complaint concerns the operations of a small packing plant or slaughter house situated in Kansas City, Kansas, during a period beginning in October, 1942, and continuing to the time of the trial of the suit in January, 1945.

The Kaiser Company is and has been for many years the owner of the plant and operated it during the time in question except for a period of ten months when it was leased to the Rutherford Company, which took over the Kaiser organization and the meat boning contracts, and continued the operations in the same manner as they had been conducted by Kaiser (R. 12, 13, pars. 6, 7). This lease had been cancelled before this suit was instituted (R. 12, par. 6; 3).

The Rutherford Company had large government contracts for canned meat. To secure itself an adequate supply of boned beef for the purpose of filling these contracts, Rutherford bought a controlling interest in the Kaiser Company in March, 1943, a few months after Kaiser began to produce boned beef, and assisted in financing the operations of Kaiser (R. 11, 12, par. 5).

In order to enable the Kaiser Company to qualify for government subsidies that were put into effect in November, 1943, and which required complete separation of slaughtering and processing operations the Rutherford Company sold its stock in the Kaiser Company to Paul Kaiser and ceased its financing of that company in the summer and fall of 1944 (R. 13-15, pars. 10-13). At the

time of trial, Rutherford's only relationship with the Kaiser Company was that of being its principal customer (R. 95, par. 14; 137).

For the purpose of this proceeding, however, the issues are treated as being identical as to both petitioners during their respective periods of operation. For convenience, "Kaiser" will sometimes be used herein as referring to the "plant operator" and as including the Rutherford Company during the period that it operated the plant.

Kaiser first determined to begin the boning of beef for canning purposes in October, 1942. Prior to that time he had one man working in the cooler who devoted part of his time to boning better cuts of beef for city trade. This was the only kind of boning that Kaiser had done theretofore (R. 16, pars. 17; 89).*

Boners were scarce and in great demand by the packers (R. 99). Normally boning of this type is seasonal and the boners go from city to city following the heavy cattle runs (R. 110).

Kaiser made inquiries as to obtaining boners which came to the attention of an experienced boner named Jim Reed who had been working with another boner named Peterson (R. 16, par. 18).

Reed advised Kaiser that he had previously worked in two St. Louis packing plants where beef was boned by independent contractors who employed the boners and performed the work at a certain price per hundredweight. Reed proposed to make a contract with the Kaiser Company on the same basis. Kaiser accepted the proposition

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*This a different type of boning from quantity boning of beef from inferior grades of cattle known as "cutters and canners." See Beef, Lamb and Veal operations, Fourth Edition (1945), published by the Institute of Meat Packing, University of Chicago (pp. 124, 125). This book was cited by both respondent and petitioners in their briefs in the Court of Appeals. These boning operations require skill (ib. p. 130).

and a written contract was drawn, dated October 14, 1942. Peterson joined in this contract (R. 16, pars. 18-19; R. 32, Ex. 1; R, 90-92).

Contracts of this character were not uncommon in Kansas City and elsewhere (R. 162, par. 22); Reed had worked for years under such arrangements (R. 90) and at the time Reed left the Kaiser plant he made an arrangement with the Kornblum Packing Company comparable to that which he had had with the Kaiser Company, which arrangement was carried on by him and his successors at that plant (R. 21, par. 34).

Reed operated under his contract until February, 1943, when he was succeeded by Schindel, an experienced boner, who took over the work under the terms of the Reed contract until May, 1944, when Hooper and Deere took over under the same arrangement. Deere dropped out in October, 1944, and Hooper held the contract at the time of trial (R. 16, 17, pars. 20, 21).

The terms of the contract between Kaiser and Reed were substantially as follows (Ex. 1, pp. 32-35):

> Kaiser agreed to furnish Reed all carcasses of beef for government boning (amended to include boning for government contractors, R. 35); Reed agreed to complete boning of all carcasses furnished him each day but not in excess of 20,000 pounds (later increased to 40,000 pounds, R. 36, par. 2, Ex. 2) of boneless meat, including waste; the work was to be performed in the vestibule of the Kaiser plant; Kaiser was to deliver the carcasses on the rail and to pick up the boned meat, tenderloins, bones and waste after they had been sorted by Reed in barrels; Kaiser was to furnish and wash all barrels; the work was to be performed in compliance with government specifications and regulations and under approval and directions of government inspectors; Reed was to do the work as an independent contractor and to employ, compensate and

be responsible for all of his employees; Reed's employees were to be under his sole direction and control and not subject to direction or control of Kaiser; Kaiser was not to have the right to supervise or direct the work of Reed or any of his employees; Reed was to furnish all his own tools and equipment except the vestibule and the boning tables; Reed agreed to carry Workmen's Compensation and Employers' Liability insurance on his employees and protect and indemnify Kaiser from injuries to persons and property caused by him or his employees; Reed and his employees were not to interfere with ingress and egress of Kaiser and its employees to the plant through the vestibule; the contract rate for the work was 40¢ per hundred pounds (later raised to 45¢ in January, 1944, R. 21, par. 35) for boneless beef, including the weight of tenderloins but excluding weight of kidney knobs, bones, waste and fat; boneless beef and tenderloins were to be weighed by Kaiser and a record kept of all weights and daily copy furnished to Reed; settlement was to be made on a weekly basis; all employees of Reed were to be affiliated with the CIO; neither party was to be liable to the other for failures occasioned by breakdowns, strikes, acts of God or other unavoidable contingencies; the agreement was to commence October 15, 1942, and to continue for the duration of hostilities subject to termination on two weeks notice.

Reed and Peterson employed about four boners to work with them (R. 16, par. 20). Schindel's group consisted of three to eight boners and averaged about six (R. 16, par. 20). Hooper and Deere hired three or four boners from May, 1944, to October, 1944, and thereafter the group consisted of from five to seven boners (R. 21, par. 35). The contractors did their "hiring and firing" at 1717 West Ninth Street, where the boners made their headquarters (R. 101, 109).

The boners were employed exclusively by Reed and his successors. Kaiser had nothing to do with engaging

the services, fixing wages and hours, determining the work to be done or controlling the activities of the boners. The following agreed facts are embodied in the stipulation (R. 22, 23, 24):

"37. The plant operator has never exercised any direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay.

"38. At no time has the plant operator kept any records with reference to the boners, except that the plant operator has kept complete and accurate records of the weight of beef boned and a complete and accurate record of the weekly sums paid for said boning as aforesaid on the aggregate weight of the boned beef on a hundredweight basis.

"39. At no time has the plant operator, through Paul O. Kaiser or any other company official, exercised direction or control over who shall work as boners or engaged the services of any boner or made any arrangements, contract, or agreement with respect to compensation with any boner, except in the instances of the arrangements with Reed, Peterson, Schindel, Deere and Hooper, as aforesaid, and except in the instance of one Dolinar, whose employment by Reed as a boner was directed by The Kaiser Co. (see Exhibit 1 attached hereto, paragraph 12). The plant operator has not directed the boners to start their work at any set time, to leave at any set time or fixed their luncheon or other rest periods. They have determined their own hours of work, though in general their hours of work on a given day would correspond to the hours other work in the plant was in progress. They have boned on days when there was no 'kill' and cattle have been killed on days on which they did not bone. Such plant operator employees as the barrel washer; laborers handling the barrels, etc., of course work about the same hours as the boners."

The CIO had contracts at the plant, which provided for a closed shop and check-off system but the boners were not included under the plant contracts, although they were members of the same local; the plant operator did not collect their dues nor were they represented or controlled by the steward of the union at the plant; the plant operator did not include them in its Workmen's Compensation policy and did not make any deductions from the checks payable to the contractors for unemployment compensation taxes or withholding taxes (R. 23, par. 40).

Payment on a hundredweight basis for the beef boned was made by weekly check of the plant operator to the contractors, first to Jim Reed until February, 1943, then to Schindel, until May, 1944, and thereafter to Hooper (R. 21, par. 35).

Sharing was the predominant method by which the boners were compensated by the contractors. During the period that the boning contract was held by Reed, and also when held by Schindel, there was an equal division of the boning money among all of the boners, except one or two part-time or inexperienced boners who were paid by the hour at the rate of $1.25 or $1.50 per hour (R. 21, par. 35). During the period from May, 1944, until October, 1944, the money paid to Hooper was divided equally between Hooper and Deere, after paying three or four boners they hired from time to time, at the rate of $1.35 to $1.50 per hour, except that toward the end they "cut in a couple of other boners on the split." After November, 1944, the money paid to Hooper was divided equally among the five to seven boners doing the boning, including Hooper (R. 21, par. 35). The contractors worked with the boners and received the same share of the boning money when it was divided on a sharing basis (R. 22, par. 35).

Reed and Schindel did not pay overtime to the few part time and inexperienced boners they employed by the hour, but Hooper, after he became the contractor, paid overtime to all hourly paid men employed by him (R. 22, par. 36).

A competent group of boners would average 350 to 400 pounds of boned meat per man per hour (R. 22, par. 35), which on the basis of 40¢ per hundredweight would equal $1.40 to $1.60 per hour and on the basis of 45¢ per hundredweight would equal $1.57½ to $1.80 per hour.

The boners were satisfied with the plan (R. 59). The government inspection which resulted in this suit, did not originate from any complaint from the boners or from employees of the plant operator but was caused by complaints from competitors of Kaiser (R. 31, par. 63).

The work of boning was performed in a room called the "vestibule" which immediately adjoined the cooler (see plat, Ex. 3, R. 40 A). The overhead rail, used for moving the dressed carcasses from the cooler to the loading dock, ran along one side of this room. When carcasses were to be boned they were brought out of the cooler on the main rail and delivered to the boners on a "detour rail" at the entrance to the vestibule (R. 18, 19, par. 27). After being delivered to the boners the carcasses were never touched or handled by any employee of Kaiser (R. 19, par. 27; R. 73), and when the boning was completed the meat was thrown by the boners into barrels or to the trimmer who removed small pieces of fat, cartilage, etc.; the barrels were removed by Kaiser's employees (R. 20, par. 30). Any carcasses not to be boned, moved directly through the boning vestibule for delivery (R. 19, par. 27).

The trial judge made findings covering the foregoing facts (R. 157-163). He also found that the contracts with Reed and his successors were not sham or deceptive arrangements but were necessitated by the exigencies of

the situation confronting the Kaiser Company in October, 1942 (R. 162, par. 19); that the plan under which boners shared equally in the boning money was commonly employed in Kansas City and elsewhere and that most of the boners who worked in the Kaiser plant worked at various times in various plants under independent contractors (R. 162, par. 21); that there was nothing inequitable in the sharing method, which gave each man an interest in the work being done by the other members of the group and also gave no advantage to the men who were boning the fleshier parts of the carcasses; under this plan beginners and casual boners could be equitably taken care of by payment on an hourly basis (R. 162, par. 21).

Opinion in the District Court.

The trial court held that there was nothing in the boning contract that was contrary to the purposes of the Act, and that in fact it would be difficult to conceive of a method of doing business that would do more to promote the principles of the Act (R, 152). It was held that the boning was done by independent contractors and that the relation of employer and employee did not exist between the Kaiser Company and the boners. The court cited with approval *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5, 1941).

Opinion of the Court of Appeals.

In the majority opinion of the Court of Appeals it was held that the boners were employees of Kaiser because the work was being done on his premises, alongside admitted employees and contributed to the common objective of plant production. The opinion likened the operation to the conventional factory assembly-line. The majority opinion gave no consideration to the fact that there was no contractual relationship existing between Kaiser and the

boners, and ignored the decision in *Bowman* v. *Pace Company* and the numerous cases which follow it. Judge Phillips filed a separate opinion, concurring in the result in so far as it granted an injunction as to certain conceded employees, but he was of the opinion that the findings and conclusions by the trial court as to the status of the boners should be accepted (R. 173), and he dissented from the order denying the motion for rehearing (R. 188).

ARGUMENT.

I.

Kaiser Had No Control As to Employment or Discharge of Boners and He Had No Contractual Relationship with Them, Either Express or Implied; They Were Employed, Paid, Directed and Controlled Solely by the Contractors.

Kaiser did not, and could not, suffer or permit any boner to work upon the premises. The contract provided that the boners should be employed and compensated by Reed and that they should be under his sole direction and control (R. 33, par. 7). Kaiser agreed that he should not have the right to supervise or direct the work of Reed or any of his employees (*ib.*).

In fact, as the parties stipulated, the plant operator never engaged the services of any boner or made any arrangement or contract with respect to the compensation of any boner nor did the plant operator ever exercise direction or control over who should work as boners (R. 23, par. 39).

It is further stipulated that the plant operator has not directed the boners as to the time to start or stop their work, but that the boners have determined their own hours of work (R. 23, par. 39); that the plant operator has not exercised any "direction or control over any sharing or division of the boning money and has no direct knowledge of how the division is and has been made or determined, or of what boners have been hourly paid or their rate of pay" (R. 22, par. 37). The exact division of the different steps of the boning process was determined by the boners themselves (R. 19, par. 28).

The trial court made findings of fact fully covering all of the matters stated above and these findings were not challenged in the Court of Appeals nor is there any suggestion in the majority opinion contrary thereto.

The Circuit Court of Appeals arrives at the conclusion that the employer-employee status existed between the plant operator and the boners on the basis of a few facts which are stated in the opinion and from none of which an agreement for compensation could be implied. None of these facts indicate that any purpose of the Act was being violated.

The fact that the work of the boners may have been preceded and followed by work of employees of the plant operator certainly is not related to any evil which the Act was intended to remedy. As a matter of fact, the work of Kaiser's employees was ended when the carcasses were delivered to the boners. The carcasses were in the exclusive possession of the boners after they were delivered on the "detour rail" (R. 19, 73). When the boning was completed nothing remained but for the employees of Kaiser to take away the barrels containing the boned meat and deliver it to the processor, in this case generally to Rutherford.

Certainly no significance attaches to the fact that the work of the boners was performed after the carcasses had been dressed, cooled and were ready for boning or for delivery as dressed beef if not to be boned.

Whether or not the facts create some resemblance to the conventional factory assembly-line can make no possible difference in the determination of the case. As a matter of fact, the resemblance is more fancied than real, but there is nothing in the Act which would prevent any manufacturer from engaging an independent contractor to perform any particular operation in connection with work performed in an assembly-line.

The work of boning constituted a separated and well defined process. The beef reached the boners in the form of a half carcass: it was delivered to them hanging head down from the "detour rail" and was never touched thereafter by any Kaiser employee until the boning was finished. It was boned and separated into (1) boned meat ready for the canner, and (2) bones, fat, waste, etc., to be sold to other processors (R. 19, par. 27).

Kaiser's complaints as to the failure of the boners to remove all the meat from the bones was a matter relating to results only and not to methods, and did not constitute control of details. Such complaints as to results have always been held to be consistent with the independent contractor relationship. *Ryan-Richards, Inc.*, v. *Whitesides*, 96 F. 2d 826 (C. C. A. 10th, 1938); *Chicago, Rock Island & Pacific Railway Company* v. *Bond*, 240 U. S. 449; *Singer Manufacturing Company* v. *Rahn*, 132 U. S. 518; *Casement* v. *Brown*, 148 U. S. 615.

The Court of Appeals does not say that any of these matters have any bearing upon the purposes of the Act, nor the evils to be remedied. Neither does it suggest any reason for holding that either singly or in their "composite effect" they would warrant the court in striking down a valid contract and substituting in lieu thereof a "relationship" not supported by any contract, express or implied.

The only conclusion that can be drawn from the opinion is that the Court of Appeals treated the phrase "suffer or permit to work" as including all persons working on the premises, including employees of an independent contractor, merely because their work contributed ultimately to plant production.

To the contrary, the very recent decision of this court in the case of *Walling* v. *Portland Terminal Company* (No.

336, decided February 17, 1947), 67 Sup. Ct. Rep. 639 (not officially reported), establishes the law to be that the phrase "suffer or permit to work" has no meaning of such all-inclusive scope. In that case the court said in the opinion by Mr. Justice Black:

> "Section 3(g) of the Act defines 'employ' as including 'to suffer or permit to work' and Section 3(e) defines 'employee' as 'any individual employed by an employer.' The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit" (Emphasis supplied).

In working for the contractors, the boxers were serving their own "personal purpose." It was their choice of occupation and their choice of employer. There was no violation of the purpose of the Act which, as stated by this Court, is "to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage."

The facts conceded by respondent in his "Memorandum for Respondent" heretofore filed in this Court would seem to bring this case clearly within this Court's holding in the *Portland Terminal case, supra.* Respondent says (p. 8):

> "* * * in the instant case petitioners were under no contract obligation to pay wages to the boners 'employed' by the 'independent contractor' boners, and petitioners had no contractual right to hire or fire such employees, * * *"

This concession is in accord with the stipulated fact that there was no promise of compensation by Kaiser to any individual boner and there certainly could be no expectation or hope on the part of the boners that they would be paid by the plant operator in the face of the fact that they were hired by the contractor, paid by the contractor and received from him compensation which was adequate for the work done. The testimony shows that they were satisfied (R. 59) and the trial court found as a fact that the amounts received were "far in excess of the minimum prescribed by the Act" and raised no inference of "any intent to impose hardships or substandard working conditions on the boners" (R. 162, par. 20). Boners were scarce and they were in an excellent bargaining position; they chose their own employer at a time when many employers and many plans of work were available (R. 99, 21) and they evidently got what they wanted.

Reed and his successors were bound by the provisions of the Fair Labor Standards Act. The boners to be employed by him would necessarily be engaged in the production of goods for commerce and entitled to the protection of the Act to the same extent as they would have been if employed by Kaiser. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (10 C. C. A., certiorari den., 318 U. S. 774). If some of them chose to become partners or joint adventurers with Reed and his successors, that was no matter of Kaiser's choosing and it was placed entirely beyond his control by the express provisions of the contract.

The sharing method was an arrangement between the boners themselves. There is nothing in the contract to control Reed or his successors in regard to the mode or amount of compensation or other arrangements that they might make with the boners employed by them. The contract does not provide for the sharing method and it is evident that this plan was adopted by the boners because they considered it to be equitable and practicable for their own purposes. The plant operator had no direct knowledge as to how the division was made or determined. This is stipulated (R. 22, par. 37).

It has long been the policy of the Federal Government to encourage cooperative effort in every legitimate form. That attitude was well expressed by Mr. Justice Brandeis in *Liggett Co.* v. *Lee*, 288 U. S. 517, 579, where he said in the course of his dissenting opinion:

> "* * * But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation."

This language was quoted with evident approval by the Court of Appeals in the First Circuit in the case of *Fleming* v. *Palmer*, 123 F. 2d 749, 761, certiorari denied, 316 U. S. 662. While the principle was held to be inapplicable there because a true cooperative was not involved, it is applicable to the sharing arrangement in the case at bar.

II.

The Trial Court Found That the Contracts Were Made in Good Faith, and the Finding Was Not Challenged on Appeal and Was Fully Supported by the Evidence.

The complaint contained no allegation of any purpose to evade the Act, but the question was raised in the trial court and was ruled against the Administrator both in the trial court's opinion (R. 148, 149) and in the findings of fact (R. 162, pars. 19, 20, 21, 22). Respondent did not challenge these findings when taking his appeal (R. 1) and there is no suggestion in the opinion of the Court of Appeals that there was any purpose to evade the Act. The findings of fact on this point are as follows:

> "19. The contracts with Reed and his successors were not merely sham and deceptive arrangements, but were necessitated by the exigencies of the situation confronting the Kaiser Company in October, 1942.
>
> "20. The contracts with Reed and his successors raise no inference of any intent to impose hardships or substandard working conditions on the boners. Individual boners received amounts far in excess of the minimum prescribed by the Act and their hours were not inconsistent with those provided in the Act.
>
> "21. The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be

equitably taken care of by payment on an hourly basis out of the boning money. There is nothing in the contract to prevent the contractor or the group from paying overtime to the boners who work on an hourly basis, which plan was practiced by Hooper since he took over in May, 1944, and which was in effect at the date on which this suit was filed.

"22. It has not been uncommon in the packing industry to use independent contractors as a method of obtaining quantity production of boned beef."

In addition to the findings of fact the trial court made the following observation in the opinion (R. 149):

"It is apparent from this record that boning is rather a special art and only within the past few years has this work been done by packing plants or slaughterhouses generally. It is a specialty not open to the ordinary laborer without training and experience. It is not unreasonable that the Kaiser Company, when it undertook to fill these government contracts, was anxious to acquire this highly skilled labor so as to meet the government requirements. It therefore entered into this contract with Reed and his successors to do this work on a poundage basis."

Notwithstanding the fact that the question of attempted evasion is not present in the case, respondent's "Memorandum" indicates that respondent will ask this Court to apply the ruling held applicable to an entirely different set of circumstances in the case of *Fleming* v. *Palmer, supra*. The Palmer case was cited by the Court of Appeals in its opinion (R. 171, 172), but without any indication of its supposed applicability. There is nothing in common between the two cases. In the Palmer case the alleged employer initiated the organization of a Cooperative Association at the suggestion of a lawyer, for the express purpose of evading the provisions of the Act

with respect to minimum wages and maximum hours. The opinion describes with great detail the steps taken by which the defendant Palmer was enabled to control the Cooperative, so that it was merely an agent of the defendant through which compensation was paid to the workers on a scale determined by defendant. The purpose of the defendant and his lawyer and the means by which it was accomplished were shown by indisputable documentary evidence. The scheme was a palpable evasion of the Act and intended to prevent its standards from being enforced.

The following quotations from the opinion by Circuit Judge Mahoney show the nature of the Palmer scheme. Among other things the court said (l. c. 759):

> "* * * He (Palmer) wrote to his New York agent that the cooperative was being formed 'naturally on the basis of dealing only and exclusively with me.' Thus he spoke as a man who had the power of life and death over the cooperative and could dictate terms to it.
>
> "Nor can there be any doubt that he has such power. He holds the workers in a state of economic subservience because they have been told that their livelihood is dependent on the continued existence of the cooperative, and they know that he can deal it the death blow at any time by rescinding the contracts and proceeding to the liquidation of the large debt owing him. He need not have fears of independent action on the part of membe because he can disenfranchise any member or any number of members at any time. The right to vote is gone if Palmer suspends the worker for failure to display the 'cooperativist spirit' or, indeed, if he merely says that the worker is 'subject to a disciplinary procedure not yet decided.'
>
> "It should be noted that the Puerto Rican workers for the most part are poverty stricken and

possess little bargaining power. * * * Many of them are also illiterate."

In addition to the above considerations, the court quotes a letter written by Palmer in which he tells how he was reorganizing the work shop of one of the employers in the industry into a cooperative. In this letter he said, among other things (l. c. 752):

> " 'On the same day, and in accordance with Castillo, I gave instructions to friend Soltero to proceed immediately to the organization of the Caribbean Embroidery Cooperative, a thing which has been agreed upon by Castillo and me to see whether, in this manner, we do not have to stop our work for even a single day.' "

Cases such as this which show a purpose to evade the law are clearly distinguishable from the case at bar. We do not challenge the principle laid down in *Fleming* v. *Palmer, supra*—indeed the decisions on which we rely recognize the fact that colorable, fraudulent and sham contracts cannot be used as a screen between an employer and workers whose wages, hours and working conditions are actually controlled by him. But the stipulated facts in this case show that no evasion was contemplated or attempted.

III.

There Can Be No Liability under the Fair Labor Standards Act Unless the Claimant Has Performed Work for the Alleged Employer under a Promise of Compensation or under Circumstances from Which Compensation May Be Implied.

The principle for which relator contends is fully in accord with the recent case of *Walling* v. *Portland Terminal Company, supra*. In that case there was an agree-

ment with respect to a training period for applicants for brakemen's jobs, under which it was agreed that the trainees should receive no compensation (except that, for the war period, there was a retroactive allowance if they were later accepted). It appears to have been conceded that the railroads derived an indirect advantage from the fact that a labor pool was built up from which the railroads could later draw employees trained for its service. But it was found that the railroads received no "immediate advantage" from the work done by the employees.

The opinion clearly excludes from the scope of the Act those who ", without any express or implied compensation agreement, might work for their own advantages on the premises of another." In the instant case the personal advantage of the boners was derived from their employment by the contractors (Reed and his successors). This work was done "without promise or expectation of compensation" from the plant operator. On the other hand, it was done under an express promise of payment of compensation by the contractor. Not only was this the express understanding and agreement between the parties, but it was the course of action pursued over a period which extended for more than two years before the time of trial.

Kaiser received an ultimate benefit from the fact that the contracts of Reed and his successors were performed, but this benefit was neither immediate nor direct. Neither was it a benefit which raised any implied promise or expectation on the part of the boners that they would be paid by Kaiser instead of the contractors.

There was no uncertainty in the contracts between Kaiser and the contractors. Reed contracted in writing to employ competent boners and be responsible for and compensate the boners employed by him, who were to be under his sole direction and control (R. 33, par. 7). Schindel, who took over the boning February 12, 1943, did so "under

an oral agreement to continue under the terms of the Reed contract" (R. 16, par. 20); in May, 1944, Hooper and Deere took over "upon the same basis"; and after Deere left in October, 1944, Hooper made a written contract on similar terms (R. 17, par. 20; 35, Ex. 2). All of these facts were stipulated.

Kaiser did not employ any boners. It is stipulated that Kaiser has never "engaged the services of any boner or made any arrangements, contract or agreement with respect to compensation with any boner" except as contained in his contracts with Reed and his successors (R. 23, par. 39); Kaiser has not controlled their hours of work, or the time that they shall start or stop work or when they shall eat their lunch or take their rest periods; the boners "have determined their own hours of work" (R. 23, par. 39). "The exact division of the [redacted] steps of the boning among the boners is determined by themselves" (R. 19, par. 28). Payment for the meat boned has always been made direct to the contractors and not to the boners (R. 21, par. 35); the plant operator "has never exercised any direction or control over any sharing or division of the boning money" and he has no direct knowledge of how the division is made or "what boners have been hourly paid or their rate of pay" (R. 22, par. 37).

In the "Memorandum for Respondent" filed in response to the Petition for Certiorari, it is conceded (p. 8) that the petitioners were under no contract obligation to pay wages to the boners "employed" by the independent contractor, and petitioners had no contractual right to hire or fire such employees.

In the majority opinion of the Tenth Circuit Court of Appeals there is no suggestion of any contractual relationship between the plant operator and the individual boners, either express or implied. The decision can only be construed as holding that without any obligation to

pay wages, either express or implied, and without even an "expectation" of payment of wages, the plant operator can be held liable simply because the work is performed on the premises and indirectly contributes toward the purpose of plant production.

This holding we believe to be contrary to the decision of this court in the *Portland Terminal Company case, supra*, and it is unquestionably contrary to opinions rendered in a number of cases decided by various courts of appeals and district courts.

In *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 137 (1944), this Court, referring to the Fair Labor Standards Act, said in the opinion by Mr. Justice Jackson:

> "* * * The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

This principle has been applied to the Act in a number of cases where the facts are analogous to those presented in the case at bar.

Bowman v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5th, 1941), was the earliest Court of Appeals decision on this question. The defendant, a wholesale grocery company, contracted with one Forsyth, to furnish a watchman at its plant. For a time Forsyth employed the same watchman who had previously been employed by defendant. Subsequently Bowman, the plaintiff, was employed by Forsyth to do the watchman's work at the Pace Company plant. In addition to his duties as watchman, plaintiff delivered and received from truck drivers employed by defendant bills covering goods carried by them, delivered pay envelopes, took charge of money brought in by drivers, and arranged for lubrication of trucks. Bowman was subject to defendant's orders and his work was performed on the

same premises, in intimate association with employees of the defendant, and toward the common purpose of the company's operations. The court held Bowman was not an employee of the Pace Company within the meaning of the Act. The court said in the opinion by Sibley, C. J.:

> "The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. If the Pace Company, in order to evade the Act, colluded with Forsyth to interpose him as an apparent independent contractor, we would hold him the agent of the Pace Company to hire and pay the watchman, so that Bowman would be the employee of the Pace Company. While that is alleged here, the proof wholly fails to sustain it, * * *
>
> * * * * * * *
>
> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, * * * If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680" (Emphasis supplied).

In *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8th, 1942), one Marvin Johnson hauled coal daily for the use of the Ferry Company; he also repaired parts of the road leading to the ferry and occasionally hauled

brick for that purpose. He was not employed or paid by the Ferry Company but was employed by the general manager of that company who operated a cotton plantation nearby. In the District Court, Johnson was held to be an employee under the definitions contained in the Act, but the Court of Appeals reversed the case and in the opinion by Circuit Judge Riddick, said:

> "* * * The Act defines an employee as 'any individual employed by an employer,' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted cannot be interpreted to include as an employee one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages. *Bowman* v. *Pace Company*, 5 Cir., 119 F. 2d 858" (Emphasis supplied).

Walling v. *Sanders*, 136 F. 2d 78 (C. C. A. 6th, 1943), is in point both as to the facts and law. The defendant in that case was a wholesale beer dealer and its salesmen drove the defendant's delivery trucks, delivered beer and picked up empty cases. The salesmen employed and paid drivers to assist them in their duties. These drivers were doing, in part at least, the identical work that the salesmen were hired to perform and worked on trucks belonging to the company alongside the drivers and to a common purpose. The Administrator brought suit against the dealer to compel him to pay overtime to the drivers. The Court said in the opinion by Simons, C. J.:

> "The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully defined by the statute. He refers to Section 3(e) of the

Act which defines 'employee' as any individual employed by an employer, and Section 3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, *ipso facto* they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

Reconstruction Finance Corp. v. *Merryfield*, 134 F. 2d 988 (C. C. A. 1st, 1943), involved the same principle from a slightly different aspect as to the facts. The F. M. Hoyt Shoe Corporation had borrowed money, on the security of its plant, from the Reconstruction Finance Corporation to whom it had later assigned all its rents, but the Shoe Corporation had retained control of the plant, discharging, directing and fixing wages of employees. Wage payments, however, were made by check of the RFC. The Court quoted and applied the rule stated in *Bowman* v. *Pace*, *supra*, and said in the opinion by Mahoney, C. J.:

"The testimony * * * is clear that in the matter of hiring and discharging employees, directing them in their work and fixing their wages, the Shoe Corporation, through its officers, was in complete control and did not consult with nor receive advice from RFC. * * *"

Walling v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943), is cited by the Tenth Circuit Court of Appeals in support of its opinion. To the contrary we rely upon it as (a) quoting and following the *Bowman* and *Sanders cases* (the latter having been decided by the same court) and (b) pointing out the distinction between a case

where there was a direct contractual relation between the alleged employer and employee and a case where there was an intervening third party. That case involved the status of homeworkers under the Fair Labor Standards Act. The homeworkers were compensated on a substandard basis, measured by the provisions of the Act. It is said in the opinion by Simons, C. J. (l. c. 63):

> "* * * The problem in the Pace case was not to determine whether a master-servant relationship existed at all, but whether it existed between the employee and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law. The same was true in our case of *Walling* v. *Sanders*, 6 Cir., 136 F. 2d 78, 81, where we said 'in so broadly defining the word "employ" Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment,' and pointed out that to so construe it as to include not only those who work for an accused employer but also those who work for anybody else, such construction would 'encompass all employed humanity.' * * *" (Emphasis supplied).

In *Walling* v. *Twyeffort, Inc.*, (C. C. A. 2, Jan. 16, 1947) 158 F. 2d 944, the defendant was engaged in the business of custom tailoring; the material was cut on defendant's premises and sent to a number of outside tailors, some of whom employed errand boys, sweepers and pressers and paid their wages; the manner in which the work was performed was such that the court held there was no valid distinction between the tailors and homeworkers as to their employee-employer status. However, one tailor, Goldberg, employed fourteen tailors and although it does not appear that there was any agreement between him and defendant in the nature of a contract which would estab-

lish his status, it was held that he was an independent contractor. The court said in the opinion by Frank, C. J.:

> "We do think that Goldberg, who employs some fourteen other tailors in his shop, does not come within the scope of the injunction, which relates only to 'employees.' Whether or not he personally performs any of the actual tailoring work is not decisive, for it seems to us that a man who employs fourteen men to do the work that he has contracted to do cannot reasonably be classified as anything but an independent contractor. * * *"

In *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (D. C. Cal., 1942) (reversed on other grounds 137 F. 2d 742; cert. denied, 320 U. S. 770), janitors were furnished banks by third party contractors. The work was done on the premises and some control was exercised (l. c. 135). The work of the janitors, as the court held (l. c. 138) was "indispensable to the banks," which "could not properly carry on their business without janitorial service." It was held that the banks had no contractual relationship with the janitors and were not liable to them but the contractors, as the immediate employers, were held liable.

Maddox v. *Jones*, 42 F. Supp. 35, 42 (D. C. Ala. 1941), is likewise in point. It was said in the opinion by McDuffie, D. J.:

> "* * * It is a matter of common knowledge that thousands of industries contract for services or material to be furnished by or through independent contractors thousands of miles away, or even on the premises of the plant or industry which receives the ultimate benefit of the labor performed by the employees of the contractor. Those industries, in a sense, 'suffer or permit' such employees to work, but not within the sense or meaning of 'suffer or permit'

as used in the Fair Labor Standards Act" (Emphasis supplied).

Also in point are *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. C. N. H., 1945, appeal dismissed, 154 F. 2d 655); *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (D. C. La., 1940); *Schroepfer* v. *A. S. Abell Co.*, 48 F. Supp. 88 (D. C. Md., 1942, affirmed on other grounds 138 F. 2d 111, cert. denied, 321 U. S. 763).

The method of sharing the boning money, which was the predominant method employed, was fair and equitable and the trial court so found (R. 162, par. 21). A similar method was approved in *Walling* v. *Plymouth Manufacturing Co.*, 139 F. 2d 178 (C. C. A. 7, 1943) certiorari denied, 322 U. S. 741. The Plymouth company had not made any profit for several years and was afraid it could not meet the standards of the Fair Labor Standards Act. Accordingly, the plant was leased to four of the officers of the company who organized a partnership in which all the workers joined on the basis of a division of the net profits by means of certain drawing accounts and distribution of the remaining profits to the partners. The opinion was written by Circuit Judge Minton who assisted in formulating the Act as a member of the Senate. The court said (l. c. 181):

> "The four lessees, or tenants in common of the leasehold, after the subletting of the property to the Plymouth Manufacturing Company joined with the workers in what they termed a partnership agreement. The four lessees in the so-called partnership agreement were at first known as the senior partners. The workers in the plant generally were termed junior partners. The workers and the senior partners performed very much the same tasks and services for the Plymouth Manufacturing Company as they had performed for the Plymouth Manufacturing

Corporation. The management of the Company's affairs was in the hands of the senior partners, who could take in new partners or let out old ones. The junior partners were to receive a drawing account based upon their contributions in labor or services, which were to be evaluated by the senior partners. Each junior partner's drawing account was determined by multiplying his hours of work by a sum per hour, which hourly rate was fixed by the senior partners."

* * * * * * *

"* * * a distribution of the profits earned in a partnership or co-operative effort gives rise to legal rights among the partners (l. c. 182).

* * * * * * *

"Whether or not there was a partnership created here by these parties is a question of their intentions" (l. c. 182).

In the District Court, Judge Slick wrote the opinion and he held that the plan "was not only legal but laudable." *Walling* v. *Plymouth Manufacturing Corporation*, 46 F. Supp. 433.

IV.

Cases Involving a Direct Contractual Relationship Are Not in Point.

In the Memorandum which respondent filed in response to petitioner's petition for certiorari, reference is made to the cases of *Fleming* v. *Palmer*, *supra*, *Walling* v. *Needlecrafts, Inc.*, *supra*, and *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4, 1942), as being cases which respondent evidently deems to support the ruling of the Circuit Court of Appeals. Counsel also refers to the case of *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 129.

Walling v. *American Needlecrafts, Inc., supra,* is a case where the defendant was in direct contractual relationship with the home-workers who were engaged in various types of needlework. In the following quotation from the *American Needlecrafts case* (139 F. 2d, l. c. 63), the court quotes from *Bowman* v. *Pace, supra,* and comments on the quotation as follows:

> "Much has been written concerning the meaning of subsection (g). It was said by the court of the Fifth Circuit in *Bowman* v. *Pace Company,* 119 F. 2d 858, 860, so greatly relied upon by the appellee: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.' This statement of principle is, however, illuminated by the illustration which immediately follows. 'If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.' There would seem to follow from this negation, an affirmation that if one does suffer or permit another to work under circumstances where an obligation to pay him will be implied, they are employer and employee under the Act. * * *".

This language shows that a case involving a direct contractual relation falls in one category and a case involving no direct contractual relation falls in an entirely different category. In the *American Needlecrafts* case the defendant did have an obligation to pay the workers and the court therefore had a right to measure and interpret the obligation and to determine whether compliance with the Fair Labor Standards Act was shown. Absent such obligation the provisions of the Act do not apply.

Southern Railway Company v. *Black, supra,* is another case where there was a direct contract for the rendering

of service between the parties alleged to stand in the employer-employee relationship. This case involved services rendered by porters or "red caps" who were hired by the defendants and permitted to render services which were held to be "absolutely necessary to the proper operation of a railway station." The men, it was said, were subject to "the general supervision and control of defendants in rendering these services and that the defendants have the power to discharge them." The court said in the opinion by Circuit Judge Parker (l. c. 282):

> "* * * And we are not impressed with the argument that the companies can escape with payment of minimum wages to them simply by providing that they shall look for compensation to tips from persons whom they assist."

In *National Labor Relations Board* v. *Hearst Publications, supra,* there was a direct contractual relationship existing between the newspapers and the newsboys through district managers. The boys, or men, were stationed at particular spots and compensation was controlled by means of fixing the difference between the prices at which the papers were sold by the newsboys and the prices they paid for them. It was also said that "substantial control of the newsboys' 'take home' can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each." Other facts are stated in the opinion from all of which this Court concluded that the newsboys were in fact employees.

It is obvious that in this Court's opinion in the *Hearst* case there was no attempt to create any contract or obligation but merely to interpret the obligation which arose from the contractual relationship between the parties and to determine the real nature of that relationship from the standpoint of economic reality.

That decision is not authority for creating wage obligations between parties who have no contractual relationship with each other.

IN CONCLUSION.

It is, we believe, clear that the boners were not employees of Kaiser or Rutherford under any possible interpretation of the facts or the law.

Respectfully submitted,

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APPENDIX

Pertinent Sections of the Fair Labor Standards Act of 1938

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

* * * * * * * *

Finding and Declaration of Policy

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free

flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as praticable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Definitions

Sec. 3. As used in this Act—

* * * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * * *

Maximum Hours

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * * *

Prohibited Acts

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused

to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent

jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Injunction Proceedings

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

* * * * * * * * *